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## Resolving Relocation Issues Pursuant to the *ALI Family Dissolution Principles*: Are Children Better Protected?\*

Janet Leach Richards\*\*

### I. INTRODUCTION

In our increasingly mobile society,<sup>1</sup> a number of factors may prompt a custodial parent to consider relocating after the divorce is final, including moving to be closer to family or other support persons,<sup>2</sup> remarrying,<sup>3</sup> fleeing an abusive situation,<sup>4</sup> seeking a higher-paying job,<sup>5</sup> or pursuing a new career.<sup>6</sup> In virtually every case, a cus-

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\*\* Cecil C. Humphreys Professor of Law, University of Memphis. The author gratefully acknowledges the support provided for this project from the Cecil C. Humphreys Foundation. The author also wishes to recognize the excellent research assistance of Ms. Elissa Mulrooney and the generosity of Dean Katherine Bartlett, reporter for *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, who provided the author with an unpublished final draft of ALI section 2.17 on relocation.

1. See Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 3 (observing that during the first four years following divorce or separation, seventy-five percent of custodial mothers moved at least once, and half of those mothers moved again).

2. See, e.g., *McGuinness v. McGuinness*, 970 P.2d 1074, 1075 (Nev. 1998) (dealing with a custodial mother who, after the death of her mother, sought to relocate from Nevada to West Virginia in order to be near her siblings and to live in her mother's house rent-free while attending college).

3. See, e.g., *In re Marriage of Shaddle*, 740 N.E.2d 525 (Ill. App. Ct. 2000) (reversing the trial court's denial of mother's petition to relocate to Florida with new spouse and child from new marriage).

4. See, e.g., *Marshall v. Marshall*, 690 N.E.2d 68 (Ohio Ct. App. 1997) (reversing award of custody to father where mother moved with children because of husband's admitted physical abuse).

5. See, e.g., *Weaver v. Kelling*, No. WD 58972, 2001 WL 55518 (Mo. Ct. App. Jan. 23, 2001) (affirming trial court's order allowing custodial mother to relocate children from Missouri to Texas so that her new husband could accept a job promotion with a substantial pay increase).

6. See, e.g., *Phillips v. Jordan*, 614 N.W.2d 183 (Mich. Ct. App. 2000) (affirming award allowing custodial mother to relocate to California based on mother's remarriage and

custodial parent's relocation with the child will significantly disrupt the coparenting relationship that the parties have been following postdivorce. Notice of that relocation decision is often viewed by the noncustodial parent as a violation of the parties' coparenting agreement and as a threat to the noncustodial parent's relationship with the child. Objections to the relocation are often viewed by the custodial parent as attempts by the noncustodial parent to assert unwarranted control or to relitigate the custody decision. Tempers tend to flare in such circumstances, and the parties often resort to renewed litigation in the form of a petition to modify custody or a motion to prevent the relocation of the child.

A relocation battle can be extremely traumatic for the child who is caught in the middle, particularly where the parties already engaged in a protracted custody fight at the time of the divorce. Yet that is the very type of case in which relocation is likely to trigger a new battle between the parents, with each parent presenting compelling arguments and claiming to be motivated by the child's best interests. Clearly, a protracted relocation dispute is not in the child's best interests.

## II. BACKGROUND

Current law governing relocation decisions varies dramatically from state to state,<sup>7</sup> often focusing on parental rights, explicitly or implicitly favoring either the custodial or noncustodial parent,<sup>8</sup> at the

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her desire to study the real estate business because a career in real estate would allow her to work part-time and to fit her schedule around the child's schooling).

7. See Edwin J. (Ted) Terry et al., *Relocation: Moving Forward or Moving Backward?*, 31 TEX. TECH L. REV. 983, 1040 (2000) (stating that jurisdictions fundamentally disagree "on the underlying premises that shape litigation in relocation disputes, and it is difficult to see how a model act can alter the fundamental disagreements," while also noting that the current trend in court opinions favors relocation).

8. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17, Reporter's Notes cmt. d (unpublished Tentative Final Draft on file with author) [hereinafter PRINCIPLES (Tentative Final Draft)] (commenting that states place very different burdens on the parents in relocation cases, ranging from a heavy burden on the relocating parent to show benefits of the relocation to a strong presumption in favor of relocation); Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 J. FAM. L. 791, 803 (1992-93) ("[D]ecisions reflect the underlying decisional principle of protecting the child's relationship with either the custodial or noncustodial parent. The policy decision to accord priority to one relationship or the other is accomplished in part by allocating the burden of proof to the nonfavored parent.").

expense of children's rights.<sup>9</sup> States that place the burden on the relocating parent<sup>10</sup> focus on the child's need for stability in the current custodial setting where the child is able to have frequent contact with both parents, especially when the non-relocating parent has been actively involved in parenting the child. States that place the burden on the non-relocating parent<sup>11</sup> focus on the importance of stability in the relationship between the child and the primary custodial parent, the fact that the relocating parent has previously been determined to be the parent best suited to be the primary custodial parent, and the relocating parent's legitimate need to relocate. Each of these approaches presents a compelling argument both for and against relocating the child.

In a perfect world, parents would always love each other and their children and would never divorce. In a less perfect world, following divorce, the parents would continue to put the children's interests first at all times, would coparent amicably, and would continue to live in close proximity and provide for frequent contact between the children and each parent. The world is not so perfect,

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9. See Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996) (summarizing the jurisprudence of various states on the relocation issue as of 1996); Spitzer, *supra* note 1, at 3 (supporting relocation absent exceptional circumstances); Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245 (1999) (reviewing current jurisprudence of all states and arguing that relocation issues should be based on children's rights); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.20, Reporter's Notes cmt. d, at 366 (Tentative Draft No. 3, Part I, Mar. 20, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, Part I)] (recognizing that "[t]he clear trend has been that of increasing leniency toward the parent with whom the child has been primarily living").

10. In such cases, the relocating parent usually must prove that the move is in the child's best interests. See, e.g., *Rice v. Rice*, 517 S.E.2d 220, 222 (S.C. Ct. App. 1999) (recognizing a presumption against removing children from the state); *Trent v. Trent*, 890 P.2d 1309 (Nev. 1995) (placing a burden on the relocating parent to show that moving is in child's best interests).

11. See, e.g., *In re Custody of D.M.G. & T.J.G.*, 951 P.2d 1377, 1383 (Mont. 1998) (explaining that because an order prohibiting a custodial parent from relocating interferes with the custodial parent's fundamental right to travel, "we require the parent requesting the travel restriction to provide sufficient proof that a restriction is, in fact, in the best interests of the child.") (quoting *In re Marriage of Cole*, 729 P.2d 1276, 1281 (Mont. 1986)); *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996) (California statute creates a "presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare"); *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996) (recognizing a presumption in favor of relocation where primary custodial parent has a good faith reason for the move, absent a showing of harm by the non-relocating parent).

however, and the reality is that primary custodial parents have differing motives for relocating, including compelling, important, legitimate, whimsical, and even vindictive motives. On the other hand, the non-relocating parent may have the same range of motivations in resisting the relocation. Focusing on parental rights and motivations leads to inconsistent outcomes and increased litigation. Even the scholars writing on the topic tend to take positions that favor<sup>12</sup> or disfavor<sup>13</sup> relocation. Courts have long recognized that relocation presents difficult issues for which there are not easy solutions.<sup>14</sup> This observation is particularly true when the court sees the issue as being determined between the parties before the court, the parents. If, instead, the issue is presented as a determination of what outcome best serves the interests of the child,<sup>15</sup> the results become more predictable and consistent, resulting in less litigation.

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12. See, e.g., Mitzi M. Naucier, *Relocation of Parents in Modification of Parenting Plans in Oregon*, 35 WILLAMETTE L. REV. 585 (1999); Richards, *supra* note 9; Bruch & Bowermaster, *supra* note 9; Spitzer, *supra* note 1.

13. See, e.g., Merrill Sobie, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?: A Response*, 15 PACE L. REV. 685 (1995); Frank G. Adams, Comment, *Child Custody and Parental Relocations: Loving Your Children from a Distance*, 33 DUQ. L. REV. 143 (1994); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 656 (1986).

14. See *Kalkowski v. Kalkowski*, 607 N.W.2d 517, 527 (Neb. 2000) ("Parental relocation issues are among the most difficult issues that trial courts face in postdivorce proceedings") (citing *Farnsworth v. Farnsworth*, 597 N.W.2d 592, 601 (Neb. 1999)); *In re Marriage of Pape*, 989 P.2d 1120, 1126 (Wash. 1999) ("Relocation cases 'present some of the knottiest and most disturbing problems that our courts are called upon to resolve'" (quoting *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996))); *Newell v. Rammage*, 7 S.W.3d 517, 525 (Mo. Ct. App. 1999) ("This case involving the move of a parent presents a most difficult decision[;] neither parent is a villain or has shown any vindictive or untoward motive in dealing with the other parent.").

15. Another court took a child-centered focus, stating,

Relocation cases such as the two before us present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.

*Tropea*, 665 N.E.2d at 148; see also *Michael A.A. v. Stephanie E.W.*, No. CN95-11285, 1999 WL 33208309, at \*2 (Del. Fam. Ct. Nov. 1, 1999) ("While the Court should consider the rights of the parents, the child's rights and needs must be given the greatest weight since the children are the least equipped to handle the stresses of the changing family situation.").

### III. ALI RELOCATION PRINCIPLES—OVERVIEW

A child-centered approach is the basis of section 2.20<sup>16</sup> of the ALI *Principles of the Law of Family Dissolution: Analysis and Recommendations* (the “*Principles*”). The *Principles* address parental relocation and offer guidelines for courts to follow in balancing the rights of the affected parties when one parent seeks to relocate with the child over the objection of the other parent.<sup>17</sup> The *Principles* also offer guidelines for achieving what is often the least detrimental alternative,<sup>18</sup> consistent with the best interests of the child. Section 2.20 will be renumbered as section 2.17<sup>19</sup> in the final draft. This article will review the proposed final draft of section 2.17.

The title of the symposium for which this article was prepared asks whether the ALI *Principles* are a blueprint to strengthen or to deconstruct families. This article argues that the relocation provisions serve to strengthen the reconstituted family unit, consisting of the child and the parent who is exercising a clear majority<sup>20</sup> of custodial

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16. See PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 9, § 2.20.

17. The Reporter’s Notes to section 2.17 identify three jurisdictions—Connecticut, Nevada and Tennessee—that have adopted relocation standards “substantially similar” to the *Principles*. PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. d. See *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998); *Hayes v. Gallacher*, 972 P.2d 1138 (Nev. 1999); TENN. CODE ANN. § 36-6-108 (Supp. 2000), *interpreted in* *Caudill v. Foley*, 21 S.W.3d 203 (Tenn. Ct. App. 1999); see also *Naucner*, *supra* note 12, at 597–98 (arguing for adoption in Oregon of the *Principles* regarding relocation, on the ground that they are consistent with Oregon appellate court opinions).

18. Finding a good solution to relocation disputes can be difficult, if not impossible: [Relocation] decisions often require a balancing of risks rather than a straightforward best interests analysis. For example, it might be in the child’s best interests to deny a custodial mother the right to relocate with a child to maintain the child’s community connection and contact with the other parent. If as a result of that decision, a custodial parent is required to live separately from a new spouse or to pass up a significant career advancement, that parent could suffer significant anger, hostility, or depression, thereby compromising parenting skills and the parent-child relationship. Thus, the decision that it is currently in the best interests of the child to have continued contact with both parents could have a profound impact on the restructured family dynamics. That impact could potentially have a detrimental effect on the child.

Arlene S. Rotman et al., *Reconciling Parents’ and Children’s Interests in Relocation: In Whose Best Interest?*, 38 FAM. & CONCILIATION CTS. REV. 341, 365 (2000).

19. PRINCIPLES (Tentative Final Draft), *supra* note 8.

20. The *Principles* use the phrase “parent who has been exercising the clear majority of custodial responsibility,” rather than the term “primary custodial parent.” The *Principles* likewise charge the state with determining what constitutes a “clear majority” through a rule of statewide application. *Id.* § 2.17(4)(a). The comment suggests that a simple majority would

responsibility (hereinafter “primary custodial parent”). The relocation provisions also serve to preserve and foster the relationship between the child and the parent who is exercising substantially less custodial responsibility than the other parent (hereinafter “nonprimary custodial parent”).

The *Principles* strengthen the reconstituted family by setting forth guidelines that are consistent with the best interests of the child in a relocation case. Social science research has addressed the question of what is in the best interests of children of divorce. Social science research<sup>21</sup> suggests that the goals of any relocation principles should include:

- (1) Stability in the custodial relationship;<sup>22</sup>
- (2) Minimization of parental conflict involving the child;<sup>23</sup> and

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not be sufficient, but that a percentage between sixty and seventy percent would be reasonable. See *id.* § 2.17 cmt. d; see also W. VA. CODE § 48-11-403 (1999) (adopting the *Principles* on relocation and setting seventy percent as the requisite amount of custodial responsibility required under this provision).

21. See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD*, 32-39 (1996) (recognizing the child's need for continuity in relocation decisions); Terry, *supra* note 7, at 1012 (summarizing social science research as finding that a child is likely to make a satisfactory adjustment to divorce if “(1) the noncustodial parent sees the child on a regular basis; (2) the custodial parent continues to be supported and exercises appropriate discipline; (3) the parents are able to cooperate without conflict; (4) the child's standard of living changes little; and (5) the transition is accompanied by no other major disruptions in the child's life.”); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311 (1996) (identifying three factors associated with good outcomes for children in postdivorce families: “(1) a close, sensitive relationship with a psychologically intact, conscientious custodial parent; (2) the diminution of conflict and reasonable cooperation between the parents; and (3) [the absence of] pre-existing psychological [problems of the child]”); FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 108 (1991) (listing two principles for guiding social policy: (1) “The more effectively custodial parents can function, the better will be their children's adjustment” and (2) “The less parental conflict children are exposed to, the better will be their adjustment.”).

Some courts have already recognized the importance of social science research in resolving relocation disputes. See, e.g., *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 642 (Minn. 1996) (“[O]ur concern must be for the Silbaugh children and their need for a sense of stability in their familial arrangements.”); *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996) (relying on the “collective wisdom of both the courts and child psychologists [for the proposition that] children, especially those subjected to the trauma of divorce, need stability and continuity in relationships most of all”) (quoting *Taylor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993)).

22. In cases where one parent is the primary residential parent, the emphasis should be on protecting the relationship between the primary residential parent and the child. However, in cases where the parents share custodial responsibilities equally, it is important to protect the child's relationship with both parents equally. See Wallerstein & Tanke, *supra* note 21, at 318.

23. See James A. Twaite & Anya K. Luchow, *Custodial Arrangements and Parental*

(3) Promotion of stable, loving relationships between the child and each parent.<sup>24</sup>

There is disagreement among researchers on the relative importance of custodial stability versus active involvement of both parents.<sup>25</sup> This fundamental difference of opinion concerning which factor is more important for the child is also reflected in the two differing approaches taken by the courts and legislatures that wrestle with the issue. One approach favors relocation while the other does not.

The ALI relocation provisions attempt to balance all three of these goals by recognizing a presumption in favor of relocation in most cases, with a secondary goal of protecting and preserving the parent-child relationship of the parent who is exercising substantially less custodial responsibility than the other parent. This approach is supported by the research of Dr. Judith Wallerstein, who argues that support for the primary custodial parent-child relationship should take precedence over joint parental access because of the presence of a correlation between the well-being of the primary custodial parent and the child's well-being and the absence of a correlation between nonprimary custodial parent visitation and the child's well-being.<sup>26</sup>

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*Conflict Following Divorce: The Impact on Children's Adjustment*, 24 J. PSYCHOL. & L. 53 (1996) (stating that the level of parental conflict is a better predictor of child adjustment than the custodial arrangement); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989) (finding severe consequences for children forced to endure frequent transfers between high conflict parents).

24. See Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 84 (2000) (stating that a review of more than seventy-five studies in the social science literature, including those authored and relied upon by Judith Wallerstein, "generally supports a policy of encouraging both parents to remain in close proximity to their children" and arguing for a best interests determination in each case). Nebraska statutory law recognizes the importance of both parents' involvement:

The Legislature finds it is in the best interests of a minor child to maintain, to the greatest extent possible, the ongoing involvement of both parents in the life of the minor child. . . . It is the policy of this state to assure the right of children, when it is in their best interests, to frequent and continuing contact with parents who have shown the ability to act in the best interests of the children and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation.

NEB. REV. STAT. § 43-2902 (1998).

25. See Terry, *supra* note 7, at 1013-15.

26. See Wallerstein & Tanke, *supra* note 21, at 312, (citing JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 238 (1989), and FURSTENBERG & CHERLIN, *supra* note 21, at 107-08); see also



The *Principles* protect the child's need for stability and continuity of custodial care and decrease the likelihood, in most cases, of protracted litigation that would negatively affect the child. This result is accomplished by decreasing indeterminacy in relocation cases through the use of a presumption, thereby discouraging litigation in most cases.<sup>27</sup> The guidelines on modifying the parenting plan also focus on protecting the interests of the other parent, thus addressing the third goal of meeting the child's need to have a loving relationship with both parents. The specific provisions of section 2.17 that combine to implement these goals are discussed below.

#### IV. PRESUMPTION IN FAVOR OF RELOCATION

Section 2.17 is designed to eliminate litigation in most cases involving relocation. The section provides that the primary custodial parent<sup>28</sup> should be allowed to relocate with the child as long as that parent proves three things: "that the relocation is for a valid purpose, pursued in good faith, and the new location is reasonable in light of the purpose."<sup>29</sup> There is no additional requirement that the relocating parent show that the move is beneficial to the child or that the move is in the child's best interests,<sup>30</sup> thus removing an area of judicial discretion that invites litigation and leads to inconsistent outcomes. This approach is child-centered, even though it recognizes a presumption in favor of relocation and precludes the court from en-

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Frank F. Furstenberg, Jr. et al., *Paternal Participation and Children's Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695 (1987) (stating that frequent visitation neither fostered nor hindered child's adjustment); Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L.J. 497, 542 (1998) (conceding that "no precise minimum level of visitation has been found to be either optimal or critical" but also criticizing the validity of some research methodology).

27. See Cheryl S. Karner, *Relocation: What Ought to Be*, 20 FAM. ADVOC. 12, 14 (1997) (observing that the "more predictable (if not formulaic) the outcome, the less likely parties will be to take their chances in a trial or hearing").

28. See *supra* note 20 for a definition of primary custodial parent.

29. PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 (4)(a); see *Ireland v. Ireland*, 717 A.2d 676, 682 (Conn. 1998); *Hayes v. Gallacher*, 972 P.2d 1138, 1140-42 (Nev. 1999) (adopting this section).

30. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 5 (stating that a father who exercised a clear majority of custodial responsibility and was transferred by his employer should be allowed to relocate, and stating further that the court should not determine whether the relocation is in the best interests of the children, but should only modify the parenting plan to allow the relocation and to minimize the impact of the relocation on the mother's relationship with the children through longer summer and vacation visits).

gaging in a best interests analysis. The approach is child-centered because it is designed to reduce litigation in a large number of cases by reducing indeterminacy, thus minimizing parental conflict involving the child. The approach is also designed to preserve the primary custodial parent-child relationship, thus promoting stability in the custodial relationship. The focus of the court's inquiry in these cases shifts from determining whether to allow the relocation to determining how best to preserve the relationship between the child and the non-relocating parent, again a child-centered approach.

The relocating parent has the burden of proving<sup>31</sup> the first requirement, the validity<sup>32</sup> of the reason for the move. The validity is presumed, however, if the reason is one of the following six designated in the section as valid reasons for relocating:

- (1) to be close to significant family or other sources of support;
- (2) to address significant health reasons;
- (3) to protect the safety of the child or another member of the child's household from a significant risk of harm;
- (4) to pursue a significant employment or educational opportunity;<sup>33</sup>
- (5) to be with one's spouse or domestic partner who lives in or is pursuing a significant employment or educational opportunity in the new location; or
- (6) to improve significantly the family's quality of life.<sup>34</sup>

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31. See *Ireland*, 717 A.2d at 682 (interpreting the ALI guidelines to place the burden on the relocating parent).

32. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 5 (finding that primary custodial father's purpose in relocating was valid because his continued employment depended upon it, where the father's employer transferred all of its employees to another office, and where the father looked for other jobs that would not require a move, but was not able to find an offer for more than eighty-five percent of his current salary); *id.* § 2.17 illus. 6 (finding that primary custodial father's purpose in relocating was not valid where he quit his job and relocated to be able to surf in his spare time and where he took a lower paying job at the new location).

33. See *id.* § 2.17 illus. 9 (finding that primary custodial mother's desire to relocate to the community where her family lived and where she could work in the family retail business was a valid purpose, where the mother was not able to find a job above minimum wage in her present location).

34. See *id.* § 2.17(4)(a)(ii); see also *Ireland*, 717 A.2d at 682 (endorsing these examples, but emphasizing that the list was not exclusive); *Hayes*, 972 P.2d at 1140-42 (adopting this section); *Hauser v. Hauser*, No. CVFA 970401065S, 1999 WL 712805, at \*2 (Conn. Super. Ct. Aug 27, 1999) (applying the list as adopted in *Ireland*, but finding that relocating to be with one's fiancé was not the same as relocating to be with one's spouse, and holding that the relocating parent failed to prove a valid purpose for the move). But see *Trent v. Trent*,

These reasons are sufficiently inclusive to remove the validity of the move as a contested issue in most relocation cases, again sparing the child from litigation.

As to the second requirement, the non-relocating party has the burden<sup>35</sup> of showing that the new location is reasonable in light of the valid purpose for the move. Section 2.17 presumes that the new location is reasonable, as long as the purpose is valid, unless the non-relocating party can demonstrate<sup>36</sup> that the purpose, though valid, can be substantially achieved either (1) without moving,<sup>37</sup> or (2) by moving to a location that is substantially less disruptive of the non-relocating parent-child relationship.<sup>38</sup>

This provision is an important limitation on relocation that serves to protect the relationship between the child and the non-relocating parent. If the needs of the relocating parent can be met without

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890 P.2d 1309, 1312 (Nev. 1995) (reversing trial court's denial of mother's request to relocate in order to marry her fiancé because of the short period of time the couple had known each other and the limited amount of time spent together since meeting).

35. See *Ireland*, 717 A.2d at 682 (interpreting the ALI guidelines to place the burden on the relocating parent).

36. The actual language of the section does not specifically place the burden on the parent opposing the relocation. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(a)(iii). It states that "[t]he court should find that a move for a valid purpose is reasonable unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child." *Id.*

Illustration 10 states that where the Montana mother who wants to pursue training in a radiology technician program shows that she was denied admission to the only program in Montana and that she has been admitted to a program in Kansas, her reason is valid and her location is reasonable. "Unless [the father] demonstrates that [she] can achieve her purpose at a location that is less disruptive to his access to the children, the court should modify the parenting plan to accommodate the relocation." *Id.* § 2.17 illus. 10. The mother should make a prima facie showing of reasonableness of the location in order to make out her case, then the burden shifts to the father to show the unreasonableness of the location. *Id.*

Illustration 11 suggests that where the primary custodial parent wants to relocate from near New York City to Las Vegas to "make a new life" as a singer, she must "explain why she has chosen Las Vegas, as opposed to . . . New York City which is closer." *Id.* § 2.17 illus. 11. Presumably, the mother in such a case would have to make a prima facie showing of the reasonableness of her choice in establishing her right to relocate. The Reporter's Notes to section 2.17 indicate that illustration 11 is loosely based on *Weiss v. Weiss*, 418 N.E.2d 377 (N.Y. 1981). See PRINCIPLES (Tentative Final Draft) *supra* note 8, § 2.17, Reporter's Notes cmt. d.

37. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 12 (finding that primary custodial parent's desire to relocate is a valid purpose, but that the location is not reasonable if it can be shown that the parent can meet her "reasonable educational objectives" by attending a law school that will not require a relocation).

38. See *Hayes*, 972 P.2d at 1140-42 (adopting this section).

moving or by moving to a location that is better for preserving the non-relocating parent-child relationship, the right to relocate will be limited accordingly. Again, the rights of the child are paramount.<sup>39</sup> Some critics may argue that this provision allows the non-relocating parent unjustified control over the other parent's right to relocate. That view is supported by an approach that focuses on parental rights and argues that the primary custodial parent should have the same unfettered right to relocate that the nonprimary custodial parent enjoys. When the issue is viewed from the child's perspective, however, one may argue that this limitation on the custodial parent's right to relocate protects the child's right both to have stability in the primary custodial arrangement and also to have the best opportunity for an ongoing relationship with the other parent. Thus, the limitation on relocation is not a right granted to the non-relocating parent at the expense of the relocating parent; it is, instead, a right granted to the child to have both stability in the custodial relationship and a stable loving relationship with both parents. Closer proximity to the non-relocating parent is likely to promote a more stable and involved relationship.

The allocation of the burden of proof as to the third requirement, that of good faith, is not clearly indicated in the provisions of section 2.17, but it seems reasonable that the non-relocating party would have the burden of coming forward with some evidence of lack of good faith after the relocating parent alleges a good faith motive in seeking to relocate. It is easier for the non-relocating parent to prove the presence of bad faith than for the relocating parent to prove the absence thereof.

Section 2.17 does not define good faith other than in the context of failure to comply with the section's notice requirements. The

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39. See *Hauser*, 1999 WL 712805, at \*2 (adopting what is now PRINCIPLES (Tentative Final Draft) § 2.17, *supra* note 8, and finding that the proposed location was not reasonable in light of the proposed purpose of remarriage because the fiancé could just as easily move to Connecticut where the custodial mother lived). For a case adopting the ALI approach indirectly, through the "reasonable purpose to relocate" requirement, see *Schremp v. Schremp*, No. W1999-01734-COA-R3-CV, 2000 WL 1839127 (Tenn. Ct. App. Dec. 7, 2000), which held that a mother did not have a reasonable purpose to relocate to North Carolina to live with her new husband, a Federal Express pilot based in Memphis, where Mother's new husband had no compelling reason to refuse to move to Memphis to live with Mother; see also PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 7 (finding that a relocation 400 miles away due to an employment transfer was not reasonable when the parent had the option to relocate only fifty miles away, but chose the more distant location in order to avoid having to arrange weekly visits between the children and their mother).

section provides that a relocating parent is required to give prior notice<sup>40</sup> of the intent to relocate and that failure, without good cause,<sup>41</sup> to comply with the notice requirements may be considered as a factor in determining whether the relocation is in good faith.<sup>42</sup> The notice requirement applies to all relocating parents, whether or not they intend to move with the child.<sup>43</sup> The advance notice gives the parties an opportunity to try to reach a voluntary agreement on a modified parenting plan that will accommodate the relocation. If an agreement is reached, the parties should submit the agreement to the court for approval so that the modifications will be judicially enforceable.<sup>44</sup>

Unfortunately, many parents are not able voluntarily to reach agreement regarding relocation. Under the *Principles*, if the parties are not able to reach a voluntary agreement, the relocating parent must seek permission from the court to relocate with the child. When the parties are trying to reach a voluntary agreement, the degree of indeterminacy in the applicable criteria can affect the outcome. Indeterminacy discourages settlement and increases the likeli-

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40. Section 2.17(2) contains the following notice requirements:

(2) Unless otherwise ordered by the court, a parent who has responsibility under a parenting plan who changes, or intends to change, residences for more than ninety days should be required to give a minimum of sixty days advance notice, or the earliest notice practicable under the circumstances, to any other parent with responsibility under the same parenting plan. Notice should include

(a) the relocation date,  
(b) the address of the intended new residence,  
(c) the specific reasons for the proposed relocation, and  
(d) a proposal for how custodial responsibility should be modified, in light of the intended move.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(2).

Domestic violence may excuse the relocating parent from providing an address in the relocation notice. *See id.* § 2.17 cmt. c.

41. The comments suggest that flight from domestic violence is an example of good cause. *Id.* § 2.17 cmt. c. A noncomplying parent should, however, seek permission of the court before failing to comply with the notice provisions, if possible, or as soon thereafter as reasonably possible. *Id.*

42. *See id.* Unexcused failure to give notice can also form the basis for an award of expenses and reasonable attorney's fees. *See id.*

43. *See id.* § 2.17(2) & cmt. c. The justification given in the comment for imposing notice requirements on the relocating parent who is not seeking to move with the child is that, "among other reasons, the custodial parent may wish to seek an upward modification of the relocating parent's child support obligation, reflecting that parent's reduced level of custodial responsibility or additional costs involved in long-distance visits." *Id.* § 2.17 cmt. c.

44. *See id.* § 2.17 cmt. c.

hood of litigation.

States that currently allow the trial court to condition relocation upon proof that the move is in the best interests of the child increase indeterminacy and encourage litigation, thereby exposing more children to the trauma of a contested relocation battle. Additionally, expenses involved in pursuing such litigation could reduce funds available for the child.

By establishing criteria that remove indeterminacy in most relocation cases, section 2.17 reduces the risk of litigation for most children whose primary custodial parent chooses to relocate postdivorce. Indeterminacy is reduced in those cases involving a primary custodial parent who satisfies the three criteria previously discussed. In such cases, the court is not permitted to deny the move simply by concluding that not relocating would be best for the child.

A 1993 Tennessee case, *Taylor v. Taylor*,<sup>45</sup> is illustrative of the open-ended best interests approach. In *Taylor*, the mother was awarded primary custody of the parties' three-year-old daughter. The mother remarried and sought to relocate with her child to Iowa in order to join her new spouse, who was enrolled in chiropractic school. She also found a job in Iowa earning the same salary as the job she currently held in Tennessee. All extended family members of both parents still lived in Tennessee and exercised frequent visitation. The father exercised regular visitation and had a close, loving relationship with the child. There were no members of the extended family living in Iowa. Based on these facts, the trial court found that it would not be in the best interests of the minor child for those regular contacts with other family members to be severed and denied the relocation petition.<sup>46</sup> The court of appeals affirmed.

The Tennessee Supreme Court reversed the trial court, adopting a rule very similar to the *Principles*,<sup>47</sup> and allowed the primary custo-

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45. 849 S.W.2d 319 (Tenn. 1993).

46. The trial court found:

There are no members of the extended family living in Davenport, Iowa, and *the only advantage to the minor child of such a move would be that she would be in a complete family*. The disadvantage of allowing the move would be that the father and all other members of the minor child's extended family would be denied ordinary visitation.

*Id.* at 321 (emphasis added).

47. The *Taylor* court held that the custodial parent would have the burden of proving that relocation was in the child's best interests, but further held that the burden could be "shifted by a prima facie showing of a sincere, good-faith reason for the move and a prima facie

dial parent, who was then living in an apartment in Tennessee with her daughter and another child, born of her new marriage, to relocate with her daughter. The court also ordered that a reasonable visitation schedule be established to maintain the father-daughter relationship.

Not all courts adopt the approach of the Tennessee Supreme Court, which favors relocation. The Supreme Court of Alabama, in *Ex parte Monroe*, was recently faced with arguments similar to those presented in *Taylor*. The trial court denied the relocation, finding that it was in the child's best interests to stay with the non-relocating parent and near very supportive extended family members.<sup>48</sup> The court of appeals reversed the trial court's order transferring custody to the father, contingent on the relocation of the custodial mother.<sup>49</sup> The supreme court, however, reinstated the trial court's order. The *Monroe* court did not articulate a specific relocation rule. Instead, it applied the general rule for seeking a modification of custody, that the party seeking the modification must show (1) that the positive good brought about by the modification will more than offset the inherently disruptive effect caused by uprooting the child, (2) that the parent seeking the modification is fit, and (3) that the change of custody will materially promote the child's best interests and welfare.<sup>50</sup> The trial court was persuaded by the father's expert who testified about the importance of the child's relationship with his father and found that it was in the child's best interests to stay in Alabama, close to his father and extended family members.<sup>51</sup> The supreme

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showing that the move is consistent with the child's best interest." *Id.* at 332. The *Taylor* rule, recognizing a presumption in favor of relocation in most cases, subject to limited exceptions designed to protect the child from harm, is similar to the ALI approach. The ALI approach differs from *Taylor*, however, in that the ALI gives greater discretion to the court and is a more comprehensive treatment of the relocation issue in that it addresses issues not addressed in *Taylor*, such as joint custody and relocation requests by the nonprimary custodial parent.

48. See *Ex parte Monroe*, 727 So. 2d 104 (Ala. 1999) (considering a mother who sought relocation after her job was eliminated and she was offered a transfer to another position in Michigan, where her fiancé lived).

49. See *id.* at 104–05.

50. See *id.* at 105.

51. See *id.* at 105–06. The father's expert testified

that fathers were "very important for sons in particular" and that by being with his father a boy "learns how to be a male, an adult male." Dr. Rinn also testified that boys who have close relationships with their fathers tend to have higher academic achievement, tend to be more empathetic as adults, and tend to be more compassionate toward others. Dr. Rinn concluded his testimony by stating that the more

court reinstated the trial court's order based on the absence of proof that the trial judge's determination was clearly erroneous or against the great weight of the evidence.<sup>52</sup> A strong dissent pointed out that neither the trial court nor the supreme court considered the detrimental impact on the child of disrupting the existing custodial relationship between the mother and the child.<sup>53</sup> The mother's expert testified that such a change would be "very difficult and at least possibly traumatic."<sup>54</sup> The ALI approach, in contrast to the *Monroe* majority, places great weight on the importance of stability in the existing custodial arrangement where one parent is the primary custodial parent.

The *Principles* would allow relocation under the facts of *Taylor* and *Monroe*, although the relocation might be limited to the duration of the degree program in *Taylor*.<sup>55</sup> The court would not, however, be permitted under the *Principles* to undertake a broad, discretionary, best interests determination like the one made by the trial judge in *Taylor*. Upon finding that the primary custodial parent has established good faith, a valid purpose, and a reasonable location, the only issue for the parties and the court, under section 2.17, would be the modification of the parenting plan so as to preserve the nonprimary custodial parent-child relationship.<sup>56</sup> The goal of the parenting

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time a male child is able to spend with his father, the more well rounded and better adjusted that child would be.

*Id.* at 106. The mother's expert testified that the child was enthusiastic about the move, that the child's relationship with the mother was very close, and that the child was emotionally dependent on the mother. *Id.*

52. *See id.* at 106.

53. *See id.* at 107 (Lyons & Kennedy, JJ., dissenting).

54. *Id.* at 108.

55. Illustration 8 to comment d in section 2.17 suggests that the court might limit the relocation in *Taylor* to the duration of the degree program. In illustration 8, the primary custodial parent marries an attorney, earning \$900,000, who is confirmed by the senate to be the U.S. Attorney General, at a salary below \$150,000. Wife seeks to relocate the child to Washington. The comment states that the "parenting plan should be modified to accommodate the relocation, at least for the period in which Jonah is Attorney General." PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 8; *see also id.* § 2.17 illus. 10 (suggesting that the modification "may be temporary, effective only while Darlene is enrolled in the program that justifies her relocation."). The Reporter's Notes to section 2.17 indicate that illustration 10 is based on *In re Marriage of Elser*, 895 P.2d 619 (Mont. 1995), *overruled on other grounds by* *Porter v. Galarneau*, 911 P.2d 1143 (Mont. 1996). PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17, Reporter's Notes cmt. d.

56. The *Principles* provide,

Under § 2.17(4)(a), if a parent has been exercising a clear majority of custodial responsibility and the move is in good faith, no further analysis is required. The court



plan modification is to preserve, to the extent possible, the same proportion of custodial responsibility and to minimize, to the extent possible, the disruptive effect of the relocation on the non-relocating parent-child relationship.<sup>57</sup> The ALI approach will, hopefully, ensure that most such cases are settled between the parties and do not devolve into protracted, contested battles that have negative consequences for the child involved.

A presumption in favor of the primary custodial parent<sup>58</sup> who seeks to relocate is supported by social science research that demonstrates the importance of continuity of care and stability in the custodial relationship.<sup>59</sup> If the child's best interests were served, at the time of divorce, by awarding primary custodial care to the relocating parent, it is reasonable to assume that the child's best interests would continue to be served, in most instances, by maintaining that custodial relationship. Further litigation would be redundant. This approach is also consistent with the priority given to "past patterns of caretaking" throughout the ALI custody provisions.<sup>60</sup>

#### V. BEST INTERESTS OF THE CHILD STANDARD

If the primary custodial parent does not qualify for the presumption in favor of relocation by establishing good faith and a valid purpose for the move to a location that is reasonable in light of that purpose, the court must decide the case based on the best interests of the child.<sup>61</sup> In such a case, there is no basis for a presumption in

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is not permitted to prevent a relocation simply because it determines that such a relocation would not, on balance, be best for the child.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. d.

57. Under the *Principles*, "the court should revise the parenting plan, if practical, to accommodate the relocation and maintain the allocation of responsibilities being exercised by each parent." PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(3). The *Principles* further state, "The court should minimize the impairment to a parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the developmental level of the child." PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(e).

58. For a definition of primary custodial parent, see *supra* note 20.

59. See *supra* note 21 and accompanying text.

60. PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. d.

61. Under the *Principles*,

If a parent who has been exercising the clear majority of custodial responsibility does not establish that the purpose for that parent's relocation is valid and to a location that is reasonable in light of the purpose, the court should order the plan modifications most consistent with the child's best interests. Among the modifications the

favor of relocation, and the court should have discretion to make a best interests determination, consistent with the *Principles* regarding the same.

#### VI. CONTINGENT REALLOCATION OF CUSTODIAL RESPONSIBILITY

One of the options suggested in the *Principles* allows the court to reallocate primary custodial responsibility contingent upon actual relocation of the primary custodial parent.<sup>62</sup> A contingent order allows the primary custodial parent the option of not relocating in order to maintain the status quo. From the perspective of the child's best interests, the status quo, presumably, would still be preferable to a change in custody to the other parent. The hope in such cases is that the primary custodial parent will elect not to relocate and that the parties will maintain the status quo regarding parental responsibilities set out in the parenting plan at the time of the divorce.

The *Principles* make clear, however, that the child's best interests are paramount.<sup>63</sup> The court should, therefore, still allow the child to relocate, even when the relocating parent fails to show good faith and a valid purpose for the move to a location that is reasonable in light of that purpose, if the court finds that relocation is consistent with the best interests of the child.<sup>64</sup>

This approach allows the relocation question to be separated from the modification of the parenting plan. The court first decides whether to allow the relocation. If relocation is denied, the parent requesting the relocation can choose not to relocate and simply re-

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court should consider is a reallocation of primary custodial responsibility, effective if and when the relocation occurs, but such a reallocation should not be ordered if the relocating parent demonstrates that the child's best interests would be served by the child's relocation with the parent.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(b).

62. *See id.* The comments state that the court should not use a conditional transfer of primary custodial responsibility to persuade the moving parent not to relocate if the other parent is not able or fit to assume that responsibility or where such allocation of parental responsibility is not consistent with the child's best interests. *See id.* § 2.17 cmt. d.

63. *See id.* § 2.17(4)(b).

64. *See id.*; *see also id.* § 2.17 cmt. d illus. 7 (permitting parent with questionable motives to relocate where relocation, despite parent's questionable motives, is in the child's best interests); *Kerkvliet v. Kerkvliet*, 480 N.W.2d 823, 829 (Wis. Ct. App. 1992) (denying motion to change custody on the basis that "although [custodial parent's] reasons for her proposed move are feeble and insensitive, the fact remains that she is an excellent primary caregiver to the children").

turn to the status quo. If the parent decides, instead, to relocate over the objection of the court, the solution is not to transfer primary custodial responsibilities automatically to the other parent,<sup>65</sup> but to determine the child's best interests. The court may make the change in custody contingent on relocation if custody with the non-relocating parent would be in the child's best interests,<sup>66</sup> but the court must allow the child to relocate where relocation is in the best interests of the child, even if the criteria giving rise to a presumption in favor of relocation are not met.

Such a situation might arise when a relocating parent seeks to relocate to be with a new spouse and children from the new marriage, but the relocating parent fails to give notice of the relocation to the other parent in bad faith and in an attempt to thwart the relationship between the child and the non-relocating parent. The court in such a case may find that the relocating parent has not established a claim for the presumption in favor of relocation and will be called upon to order a parenting plan modification most consistent with the child's best interests. The court may find that relocation is, nevertheless, in the child's best interests, based on the need for stability in the custodial arrangement, the need to be with other step-siblings, and the child's wishes.<sup>67</sup> This approach treats the child's interests as paramount, unlike courts that automatically transfer custody to the other parent without finding that such a change is in the child's best inter-

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65. See *Hayes v. Gallacher*, 972 P.2d 1138, 1140-42 (Nev. 1999) (adopting the *Principles* and reversing trial court's order transferring custody to the father, conditioned on the mother's relocation to Japan, without first making a determination that custody with the father would be in the children's best interests, especially in light of a substantiated history of domestic violence).

66. See *PRINCIPLES* (Tentative Final Draft), *supra* note 8, § 2.17 illus. 11. This illustration considers a primary custodial mother who sought to relocate from New York to Las Vegas to "make a new life" as a singer, although she had no concrete plans for doing so and no explanation why her goals could not be achieved nearby in New York City. *Id.* The illustration suggests that "[u]nless she carries the burden on these matters, or demonstrates that her continued primary custodial responsibility is in [the child's] best interests even if her move is not reasonable, the court should conditionally order that [the father] have primary custodial responsibility of [the child]." *Id.*; see also *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983) (reversing order denying permission to relocate without an evidentiary hearing where denial of petition was likely to result in a change of custody).

67. These are all factors that the court may consider in making a best interests determination under the best interests test in *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.09 (Tentative Draft No. 4, April 10, 2000) [hereinafter *PRINCIPLES* (Tentive Draft No. 4)].

ests, but simply upon finding that the relocation should be denied,<sup>68</sup> or courts that condition custody on not relocating where a change in custody would not be in the child's best interests.<sup>69</sup>

#### VII. RELOCATION BY NONPRIMARY CUSTODIAL PARENT

If the request to relocate with the child is made by a nonprimary custodial parent, the relocating parent must show that the relocation is necessary to prevent harm to the child.<sup>70</sup> This approach is consistent with social science research favoring continuity of custodial care as well as the general focus in the *Principles* supporting pre-divorce allocations of parental responsibility.<sup>71</sup> A relocating parent who has been exercising substantially less custodial responsibility for the child than the other parent should not be permitted to relocate with the child and disrupt the existing relationship between the child and the primary custodial parent, at least absent a showing of potential harm to the child. Such a claim might be established where the child lives primarily with the non-relocating parent, but has such a deep emotional attachment to the relocating parent that relocation is necessary to prevent harm to the child.<sup>72</sup>

A nonprimary custodial parent who is not able to make a sufficient showing of harm to relocate with the child may still request the

68. See, e.g., *Sullivan v. Sullivan*, 594 N.Y.S.2d 276, 278 (N.Y. App. Div. 1993) (reversing trial court's order that denied mother's petition to relocate and transferred custody to the father without determining that such a change was in the children's best interests, where father would be at work "four out of five days" and would not get home until 11:15 p.m. and where mother was employed part-time and had flexible hours that allowed her to be more involved in child care).

69. See, e.g., *id.* (reversing trial court's transfer of custody to father, finding that it was in children's best interests to remain in mother's custody, but conditioning mother's continuing custody on her return to her pre-petition location).

70. The *Principles* explain,

The court should deny the request of a parent for a reallocation of custodial responsibility to enable the parent to relocate with the child if the parent has been exercising substantially less custodial responsibility for the child than the other parent, unless the relocating parent demonstrates that the reallocation is necessary to prevent harm to the child.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(d).

71. See PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09(3) (referring to "this section's priority on the share of past caretaking functions each parent performed").

72. See *id.* § 2.09(1)(d) (recognizing an exception to the presumptive allocation of custodial responsibility based on pre-separation caretaking where necessary "to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child").

court to modify the parenting plan in order to minimize the disruptive effect of the relocation on the nonprimary custodial parent-child relationship.<sup>73</sup> This relief should be requested only where the parties are not able to reach a voluntary agreement to modify the parenting plan to accommodate the relocation.

#### VIII. JOINT PHYSICAL CUSTODY STANDARD

In cases involving shared parenting or joint physical custody, there is no primary custodial parent and, consequently, no basis in social science research to give preference to the relocating parent. In such cases, the *Principles* state that the court should be guided by the best interests of the child, taking into account the effects of the relocation on the child.<sup>74</sup> As always, the parties should be encouraged to work out a modification of the parenting plan and submit it to the court for approval. Voluntary agreements in such cases may be harder to achieve because of the absence of a presumption in favor of either parent and because of the deep involvement and commitment of each parent in the child's life.<sup>75</sup> However, the fact that the parents

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73. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. f illus. 14 (finding that a father with alternate weekend custodial responsibility who is transferred by his employer would not be allowed to relocate with his son absent a showing of harm to the child by remaining in the mother's care, even though the father's new wife would be able to keep the child at home instead of using day care, as the mother currently did, while she worked full-time; however, the father would be able to obtain a modification of the parenting plan to accommodate alternative visiting arrangements with the child); see also *id.* § 2.17 cmt. g illus. 17 (allowing a father who intends to move from New York to California and whose four-year-old daughter spends two nights per week with him, to modify the parenting plan to provide for two week-long visits in California, provided that two separate week-long visits are "practical in light of the resources of the parents and the age of the child").

74. The *Principles* provide,

If neither parent has been exercising a clear majority of custodial responsibility for the child, the court should order the plan modifications most consistent with the child's best interests, taking into account all relevant factors including the effects of the relocation on the child.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(c); see also McGuinness v. McGuinness, 970 P.2d 1074, 1080 n.1 (Nev. 1998) (Springer, C.J., dissenting) (citing PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 9, § 2.20 (4)(b) in support of the application of a best interests test in cases involving joint physical custody); PRINCIPLES (Tentative Final Draft) § 2.17 illus. 17 (stating that the court should apply a best interests test when both parents are actually sharing custodial responsibilities equally and the relocation of one of them makes the continuation of such allocation impracticable).

75. See, e.g., Hoover v. Hoover, 764 A.2d 1192 (Vt. 2000) (affirming award of sole custody to father when mother sought to relocate and parties, who shared custodial responsibilities nearly equally, were not able to reach an agreement among themselves).

have shared custodial responsibilities on a nearly equal basis suggests a higher level of cooperation<sup>76</sup> than exists in the many cases where one parent is the primary custodial parent. This particular provision is not very controversial, as a number of states apply a best interests test when the parties have nearly equal parenting responsibilities, sometimes referred to as shared or joint physical custody.<sup>77</sup>

#### IX. PRESERVATION OF THE NON-RELOCATING PARENT-CHILD RELATIONSHIP

The ALI relocation provisions recognize the importance of preserving and protecting the relationship between the child and the non-relocating parent. Section 2.17(3) provides that the court should, where practical, modify the parenting plan both to accommodate the relocation and to maintain the allocation of responsibilities being exercised by each parent.<sup>78</sup> Modifications should, where possible, “maintain the child’s existing relationship with each parent, without unnecessarily changing the basic shares of a parent’s responsibility.”<sup>79</sup> Oftentimes, it is possible to allocate roughly the same proportion of custodial time after the relocation by allowing longer summer and holiday visits if the child is school-aged.<sup>80</sup>

Such maintenance of relative parental responsibilities will not be possible in all cases involving relocation, however. As to those cases, section 2.17(4)(e) charges the court to minimize the potential harm to the non-relocating parent-child relationship through alternative

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76. Almost all joint physical custodial arrangements are the result of an agreement of the parties. Historically, courts have been very reluctant to order parties to share physical custody on a equal basis, but have approved such arrangements when they were proposed by agreement of the parties.

77. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996); *Brisbois v. Brisbois*, 767 So. 2d 887 (La. Ct. App. 2000); *Braun v. Headley*, 750 A.2d 624 (Md. Ct. Spec. App. 2000); *Brown v. Brown*, 621 N.W.2d 70 (Neb. 2000); *Murphy v. Jaramillo*, 795 P.2d 1028 (N.M. Ct. App. 1990); *Myer-Liedtke v. Liedtke*, 762 A.2d 1111 (Pa. Super. Ct. 2000).

78. According to the *Principles*, “When changed circumstances are shown under Paragraph (1), the court should revise the parenting plan, if practical, to accommodate the relocation and maintain the allocation of responsibilities being exercised by each parent.” *PRINCIPLES* (Tentative Final Draft), *supra* note 8, § 2.17(3).

79. *Id.* § 2.17 cmt. d.

80. The non-relocating parent may still object that such an arrangement is detrimental to the parent-child relationship because of the loss of frequent, regular involvement in the child’s life. The relocating parent may object to such an arrangement as giving all the “fun” time to the non-relocating parent and leaving the relocating parent only with the “school” time.

arrangements<sup>81</sup> for parental responsibility, taking into account the parties' resources and circumstances as well as the developmental needs of the child.<sup>82</sup> The *Principles* do not specify the manner in which the court is to take into account the parties' resources in providing alternative arrangement for parental responsibility. Tennessee currently allows the court to consider the increased travel expenses associated with relocation as a basis for reducing the child support obligation.<sup>83</sup> A Nevada district court, in *Trent v. Trent*,<sup>84</sup> allocated the burden of travel expenses to the relocating parent, finding that it was appropriate to do so in light of the relative economic circumstances of the parties. Making the payment of travel funds an obligation between the parties rather than offsetting those costs against child support is more protective of the child's interests and insures the availability of support necessary for the child.

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81. Where the non-relocating parent is not available for long summer visits because of his work schedule, illustration 16 suggests the following alternatives:

The court may require [the mother] to investigate year-round school alternatives that would free the children up for longer visits during the fall and winter months when [the father] is more available. Another possibility would be for [the father] to spend some extended periods in Kansas during the time when he is not working so that he can spend more time with the children. The plan could also contain measures to further communication between [the father] and his children when they are apart for extended periods, such as telephone calls, letters, and tapes.

PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 16.

82. The *Principles* direct, "The court should minimize the impairment to a parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the developmental level of the child." PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4)(e); *see also* Hayes v. Gallacher, 972 P.2d 1138, 1140-42 (Nev. 1999) (adopting this section). Also, the *Principles* state that where the parents earn more than \$500,000 annually, the parenting plan should be modified to enable the non-relocating parent to maintain his relationship with his children to the greatest extent possible. Since the children are old enough to fly and financial resources are ample, frequent weekend visits, prolonged vacation periods, and specific measures designed to further communication during the week should be specified, such as telephone, the Internet, and even the U.S. mail. PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 15.

83. *See* PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 15 ("The court shall assess the costs of transporting the child for visitation and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child for visitation.").

84. 890 P.2d 1309, 1313 (Nev. 1995) (allowing relocation with the relocating mother paying the transportation costs and accompanying the child for visits, where the mother would be able to bear the costs, but the father would not).

## X. STANDARD FOR REVIEW OF RELOCATION REQUESTS

Not every relocation is a basis for court intervention under the ALI relocation guidelines. A relocation is a substantial change in circumstances, justifying court oversight, only when the relocation significantly impairs the status quo regarding the exercise of parental responsibilities.<sup>85</sup> Thus, the parent who has not been exercising those parental responsibilities awarded in the parenting plan prior to receiving notice of the proposed relocation cannot object to the relocation on the ground that it will impair that parent's ability to exercise awarded parental responsibilities after the relocation.<sup>86</sup> A parent must seize upon and exercise parental responsibilities in order to claim protection under this section when those rights are threatened by relocation.<sup>87</sup>

The only exception to this threshold test is the situation in which the attempt by one parent to exercise parental responsibilities has been thwarted.<sup>88</sup> The *Principles* afford protection to the parent who has tried, without success, to exercise parental responsibilities allocated in the parenting plan, prior to receiving notice of the proposed relocation.<sup>89</sup> Acquiescence on the part of the thwarted parent, how-

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85. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(1) ("The relocation of a parent constitutes a substantial change in circumstances . . . only when the relocation significantly impairs either parent's ability to exercise responsibilities that parent has been exercising or attempting to exercise."); see also *Hayes*, 972 P.2d at 1140-42 (adopting this section).

86. See Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 1031 n.161 (1999) (citing the ALI relocation provisions and arguing that where the non-relocating parent has failed to assume parental responsibilities, relocation by the primary custodial parent should not satisfy the "change in circumstance" standard which entitles the non-relocating parent to challenge the move).

87. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 illus. 1 (finding that a mother's planned relocation does not constitute a substantial change of circumstances where the father has, of his own volition, seen the child only eight times during the past year, despite a parenting plan which allocates parental responsibility to the father from Thursday after school through Sunday after dinner each week).

88. See *id.* § 2.17(1); see also *id.* § 2.17 illus. 4 (stating that one parent's abduction of the child, in violation of the parenting plan which allocated custodial responsibilities equally between the parents, was a substantial change of circumstances and the court's allocation of custodial responsibilities should be decided based on the best interests of the child, pursuant to section 2.17(4)(c)).

89. See *id.* § 2.17 illus. 3 (stating that whether the mother's planned relocation amounted to a significant change of circumstances would be determined by the time allocated to the father in the parties' parenting plan, rather than the lesser, actual time spent with the child due to the mother's interference, where the father challenged the mother's attempt to restrict his access to the child as provided for in the parenting plan, first by complaining to the mother and later by petitioning the court).



ever, will lead to forfeiture of this protection.<sup>90</sup>

One might argue that a rule that conditions the right to challenge a relocation on whether the non-relocating parent has actually been exercising parental rights is actually an attempt to protect the primary custodial parent's rights rather than the child's interests, given the social science research recognizing the importance of maintaining an ongoing, loving relationship with both parents. Actually, the rule both prevents manipulative behavior by a parent who is not interested in being involved in the child's life, but who is interested in controlling and thwarting the other parent, and protects the innocent parent whose noninvolvement is the result of manipulative behavior on the part of the relocating parent. The rule also protects the child's right to access to the non-relocating parent, to the extent that the parent is willing to be involved in the child's life. Under this rule, the previously uninvolved parent is not allowed to challenge the relocation, but would be allowed to seek a modification of the parenting plan to obtain an allocation of parenting responsibilities after the relocation. Thus, the door is always open for the uninvolved parent to become involved in the child's life, to the extent that such involvement is consistent with the child's best interests.

#### XI. JUDICIAL DISCRETION

One of the chief complaints about a presumptive rule in favor of relocation, like that contained in the *Principles* regarding primary custodial parents, is that it takes discretion away from the trial judge. One response to this complaint is that broad discretion results in greater indeterminacy, which leads to increased litigation and conflict. The presumption in favor of relocation produces determinacy and reduces litigation and conflict. There are instances, however, when the presumption, however well-intentioned and helpful in most cases, may fail to protect the child's best interests in a particular case. The task is to identify those limited situations in which the court should be allowed to exercise discretion in order to protect the

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90. See *id.* § 2.17 cmt. b ("a parent who acquiesces in the new arrangements cannot later rely on parental prerogatives the parent did not value highly enough to protect"); *id.* § 2.17 illus. 2 (suggesting that whether the mother's planned relocation amounted to a significant change of circumstances would be determined by the actual time the father spent with the child rather than the time allocated to him in the parenting agreement, where the father acquiesced in the mother's scheduling the child's activities at times that conflicted with the father's available time).

child.

Section 2.17 provides that the court, in addition to following the principles reviewed above, may also consider the best interests of the child as defined in the *Principles*.<sup>91</sup> The ALI best interests definition presumes that the pre-separation allocation of custodial responsibility is consistent with the child's best interests, but allows the court to consider, when appropriate to do so, certain limiting factors, including the wishes of the child, the emotional attachment of the child to each parent, any agreement between the parties, the availability of a parent to meet the child's needs, the practicality of the allocation of parental responsibility, the need to keep siblings together, and the need to protect the child from substantial and almost certain harm.<sup>92</sup> These limiting factors afford the court some discretion in determining whether a modification is appropriate.

For instance, a primary custodial parent who seeks to relocate in good faith, for a valid purpose, and to a reasonable location may nevertheless be prevented from doing so if the parties have entered into an agreement that addresses the issue of relocation.<sup>93</sup> This non-removal provision is one of the more controversial provisions in the relocation principles. A number of courts in the past have refused to enforce such agreements<sup>94</sup> or have limited their enforceability.<sup>95</sup> Some states, however, enforce such agreements.<sup>96</sup> Section 2.17 takes

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91. See *id.* § 2.17(4) ("best interests as defined in § 2.08 and § 2.09," which were previously numbered as § 2.09 and § 2.10, respectively, and are found in PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09 and PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 9, § 2.10).

92. See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17(4).

93. See *id.* § 2.17 illus. 18 (upholding and enforcing agreement that provided that the parents would share roughly equal parental responsibility and that the mother would have primary custodial responsibility unless she relocated, in which case the parenting plan would be modified to give primary custodial responsibility to the father, where mother could not show "unanticipated, substantial change in circumstances" or "severe and almost certain harm to the children" to justify avoiding the agreement). The Reporter's Notes to section 2.17 indicate that some of the facts from illustration 18 are drawn from *Bell v. Bell*, 572 So. 2d 841 (Miss. 1990). See PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17, Reporter's Notes cmt. h.

94. See, e.g., *Bell*, 572 So. 2d at 841 (refusing to enforce relocation restriction requiring child to spend entire minority in same community); *In re Marriage of Littlefield*, 940 P.2d 1362, 1372 (Wash. 1997) (holding that relocation restrictions in parties' agreements are not enforceable).

95. See, e.g., *Hovater v. Hovater*, 577 So. 2d 461, 463 (Ala. Civ. App. 1990) (holding that a "reversionary" custody clause, which provides that custody will automatically revert to the other parent if the primary custodial parent relocates, is unenforceable).

96. Arizona law, for instance, provides,

the position that the agreements should be enforceable, subject to a number of policing policies. The comments to section 2.17 suggest that a provision in the parenting plan conditioning relocation upon agreement by the other parent would be binding unless the relocating parent could demonstrate unanticipated changed circumstances or severe and almost certain harm to the child.<sup>97</sup> The agreement itself can be challenged if it was not knowingly or voluntarily entered into, or if it would be harmful to the child.<sup>98</sup> A court hearing on these issues is mandated where child abuse or domestic abuse has occurred, but a hearing is discretionary in other instances.<sup>99</sup> A potential danger is that nonprimary custodial parents will routinely insist upon such nonremoval provisions in the parenting plan, thus injecting more indeterminacy into the relocation question and increasing the potential risk of trauma for the child.

The comments to section 2.17 also suggest the value of enforceable agreements in facilitating compromises between parents that serve the child's interests. The example is given of a relocating parent being willing to allow a child to remain temporarily with the other parent following relocation if the relocating parent is secure in the knowledge that the agreement will be enforceable so that the situation will remain temporary.<sup>100</sup> This approach might encourage a relocating parent to allow a child to finish the school year with the

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The court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests. There is a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child's best interests.

ARIZ. REV. STAT. ANN. § 25-408(I) (West 2000); *see also* Tomasko v. Dubuc, 761 A.2d 407 (N.H. 2000) (enforcing non-relocation clause upon finding that move was not in children's best interests); Lenz v. Lenz, 40 S.W.3d 111 (Tex. Ct. App. 2000) (enforcing non-relocation agreement despite mother's request to relocate in order to remarry and return to Germany, where the two parties, German citizens, were married).

97. *See* PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. h, illus. 19 (allowing a primary custodial parent to relocate despite a parenting plan provision requiring consent of the other parent where the relocating parent could show unanticipated changed circumstances justifying the relocation and modification of the parenting plan based on her inability to find appropriate work due to health concerns). The Reporter's Notes to section 2.17 indicate that illustration 19 is based, in part, on *Williams v. Pitney*, 567 N.E.2d 894, 898 (Mass. 1991). *See* PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17, Reporter's Notes cmt. h.

98. *See* PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.07(1).

99. *See id.* § 2.07(2).

100. *See* PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 cmt. h.

non-relocating parent, rather than forcing the child to relocate in the middle of the school year.

Presumably, the other limitations under the ALI best interests definition would also serve as limitations on the primary custodial parent's right to relocate and as grounds for the exercise of judicial discretion. For instance, a primary custodial parent who seeks to relocate in good faith, for a valid purpose, and to a reasonable location may be prevented from doing so in order to accommodate the firm and reasonable preferences of an older child.<sup>101</sup> A high school student might successfully oppose relocating with the primary custodial parent under this provision if the court found the child's preference to be reasonable under the circumstances. This section does not give children veto power over their parents' relocation decisions; it simply allows the child's voice to be heard and to be considered by the court where the court finds it appropriate to do so.

The court also has discretion to deny the relocation of a primary custodial parent who otherwise meets the presumptive test for relocation if the court finds that relocation would harm the child because of a gross disparity in the quality of the emotional attachments between each parent and the child.<sup>102</sup> One parent may be designated the nonprimary custodial parent under the *Principles* because of the *Principles'* presumption in favor of the pre-separation allocation of parenting responsibilities.<sup>103</sup> The nonprimary custodial parent may, nevertheless, be the primary psychological parent for the child such

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101. See PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09(1)(b). The *Principles* direct that the state should adopt a uniform rule of statewide application regarding the age at which a child's preferences may be considered. See also Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce On Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368, 376-77 (1998). This article summarizes the findings of a twenty-five-year longitudinal study of children of divorce. *Id.* The researchers found negative consequences resulting from the failure to consider the older child's wishes and concerns regarding visitation, sometimes resulting in total destruction of the noncustodial parent-child relationship that the visitation was intended to foster. *Id.* In fact, they reported that "[n]o single child who saw his or her father under a rigidly enforced court order or unmodified parental agreement had a good relationship with him after reaching adulthood." *Id.*

102. See PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09(1)(d).

103. The *Principles* provide,

Unless otherwise resolved by agreement of the parents . . . the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation . . . .

PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09(1).

that relocation under certain conditions could result in severe emotional harm to the child. In such cases, the court would have discretion to protect the child's best interests, even where the relocating parent sought to relocate in good faith, for a valid purpose, and to a reasonable location.

Additional judicial discretion is granted where a child would be harmed because of a gross disparity between "each parent's demonstrated ability or availability to meet the child's needs."<sup>104</sup> It is not clear whether this section could be read broadly enough to address the situation where the parent's inability appears likely but has not been actually "demonstrated." A primary custodial parent who is bipolar may be functioning adequately when living with her parents, who act as a support system by helping with the child care and by making sure that the parent sees her therapist regularly and takes her medication. A court might be justifiably reluctant to allow the parent to relocate to a place where there is no support system in place to ensure continued ability on the part of the parent to meet her parental obligations.

A final concern that appears not to be addressed by the *Principles* is a relocation to a country that might not recognize the rights of the nonprimary custodial parent. If a primary custodial father seeks to relocate to a country that does not recognize the custodial rights of the nonprimary custodial mother, the court would be justified in denying the relocation without some assurance that the mother's custodial rights could be protected. Although there is no provision directly addressing this issue, the *Principles* do contain an additional discretionary best interests factor, "to avoid substantial and almost certain harm<sup>105</sup> to the child,"<sup>106</sup> which should provide the court the discretion necessary to protect the child.

## XII. CONCLUSION

The *Principles* do an excellent job of balancing the rights of both

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104. *Id.* § 2.09(1)(d). Section 2.09(1)(h) contains an additional discretionary best interests factor, "to avoid substantial and almost certain harm to the child," which might also be relied upon by the court in this instance. *Id.* § 2.09(1)(h).

105. See William G. Austin, *Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives*, 34 FAM. L.Q. 63, 64 (2000) (presenting a forensic psychological model of relocation risk assessment for use by the court in assessing potential harm to the child caused by the relocation).

106. PRINCIPLES (Tentative Draft No. 4), *supra* note 67, § 2.09(1)(h).

parents and the child and of ensuring that the child's rights are paramount. Relocation is a problem for which there are no easy solutions, but the *Principles* provide guidelines that will serve the child's interests by decreasing litigation, increasing stability in the custodial relationship, preserving and fostering the child's relationship with each parent, and providing limited judicial discretion when necessary to protect the child. Children will be well served by the adoption of the *Principles* on relocation. The West Virginia legislature has already adopted the relocation provision with only minor amendments,<sup>107</sup> and other states have judicially adopted significant portions of it.<sup>108</sup> Hopefully, courts and legislatures in the other states will give careful consideration to the *Principles* on relocation and decide to adopt them as well.<sup>109</sup>

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107. See W. VA. CODE § 48-11-403 (1999).

108. Connecticut and Nevada each adopted a portion of the ALI relocation provisions as set forth in PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 9, § 2.20. See *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998); *Hayes v. Gallacher*, 972 P.2d 1138, 1140-42 (Nev. 1999); see also *supra* note 17 (listing other states with relocation provisions similar to the ALI guidelines).

109. PRINCIPLES (Tentative Final Draft), *supra* note 8, § 2.17 incorporates by reference certain portions of two other sections, § 2.09 and § 2.10, of PRINCIPLES (Tentative Draft No. 3, Part I), *supra* note 9. It is still possible to adopt the relocation provision without adopting the entirety of the *Principles*. The relevant portions of the other two sections could simply be incorporated into a relocation statute or court opinion based on the language in section 2.17.

